Petition

NO. 81-803

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

PAVERITE, INC.,
Petitioner,

v.

ITT INDUSTRIAL CREDIT COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE

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10-23-81-60

QUESTION PRESENTED FOR REVIEW

Did the Courts of Tennessee fail to apply properly Rules 914 and 713 of the Federal Bankruptcy Act of 1898, as Amended, in denying on the ground of **res judicata** access to the State courts to a corporation reorganized under Chapter XI of said Act to bring a cause of action against a claimant of the now-discharged bankrupt?

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13 Collier's (14th ed.) § 914.03 9

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petitioner Paverite, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Tennessee entered in this proceeding on March 31, 1981.

OPINION BELOW

The Supreme Court of Tennessee denied the petitioner's application for permission to appeal from the decision and opinion of the Court of Appeals of Tennessee. The opinion of the Court of Appeals of Tennessee appears in the Appendix hereto (A-39). No opinion was rendered by the Supreme Court of Tennessee.

JURISDICTION

The judgment and opinion of the Court of Appeals of Tennessee was entered on March 31, 1981 (A-39). An application for permission to appeal to the Supreme Court of Tennessee was filed within the time allowed by law. The application for permission to appeal was denied by the Supreme Court by order entered on June 29, 1981 (A-47). A timely petition for rehearing was denied on August 3, 1981, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTORY PROVISIONS INVOLVED

United States Code, Title II:

Rule 713: *Counterclaim and Cross-claim*

Rule 13 of the Federal Rules of Civil Procedure applies in adversary proceedings, except that (1) subdivision (f) does not apply, (2) a party sued by a trustee or receiver need not state as a counterclaim any claim which he has against the bankrupt, his property, or the estate, (3) when a trustee or receiver fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice so requires, he may by leave of court

set up the omitted counterclaim by amendment or by commencing a new adversary proceeding or separate action, and (4) persons other than the original parties to the adversary proceeding may be made parties to a counterclaim or cross-claim in accordance with Rules 719 and 720.

Rule 914. *Procedure in Contested Matters not Otherwise Provided for*

In a contested matter in a bankruptcy case not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No responsive pleading is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons, complaint, and notice by Rule 704. In all contested matters, unless the court otherwise directs, the following rules shall also apply: 721, 725, 726, 728-737, 741, 742, 752, 754-756, 762, 764, 769, and 771. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable and relevant in a contested matter in a pending bankruptcy case may proceed in the same manner as provided in Rule 727 for the taking of a deposition before an adversary proceeding. For the purposes of this rule a reference in the rules in Part VII to adversary proceedings shall be read as a reference to contested matters. Notice of an order or direction under this rule shall be given when necessary or appropriate to assure to

the parties affected a reasonable opportunity to comply with the procedures made applicable by the order.

STATEMENT OF THE CASE

A. SUMMARY

Paverite, Inc., has been deprived by the state courts of Tennessee of any opportunity to have an adjudication on the merits of its claim of wrongful repossession against ITT Industrial Credit Company. The Circuit Court of Knox County and the Tennessee Court of Appeals ruled that Paverite's claim was precluded by prior proceedings occurring in its Chapter XI federal bankruptcy action. As a recitation of the salient facts bears out, Paverite to this date has not been given a hearing on this claim and will not unless the Court grants this petition.

B. THE WRONGFUL REPOSSESSION

Paverite, Inc., petitioner herein, and ITT Industrial Credit Company, respondent herein, in the late 1970's had an on-going business relationship. Paverite was, and is still, in the business of asphalt paving. ITT was, and is still, in the business of commercial lending. At the time this dispute arose, Paverite had received a loan from ITT in the sum of $459,629.00, which was secured by Paverite's road building and paving equipment.

On December 21, 1978, ITT filed a complaint in the Chancery Court for Knox County, Tennessee (A-1), and applied for the issuance *ex parte* of a writ of possession for Paverite's road building and paving equipment, alleging as follows as its ground for repossession:

> Paverite is seriously impairing the plaintiff's [ITT's] security interest in the property, in that

> proper insurance as provided by the security agreement will be cancelled as of 12:01 a.m. on December 24, 1978. (¶11 of the complaint; A-4)

The complaint was sworn to by ITT's Regional Manager, Harry D. Chance, and the writ issued *ex parte* on December 21, 1978.

Actually no danger existed that Paverite's insurance would be cancelled, and ITT's security interest in this equipment was never threatened. The Chancellor ultimately found, "that Paverite had in fact extended the insurance, and that there in fact never was any danger of impairment of security by reason of lack of insurance on the secured property" (A-14).

The day after ITT obtained the writ of possession *ex parte*, ITT commenced repossession of Paverite's equipment. On the same day, December 22, 1978, Paverite, as a result of ITT's action and in order to protect itself, filed a voluntary petition in the United States Bankruptcy Court pursuant to Chapter XI of the Bankruptcy Act.

After Paverite filed its petition in bankruptcy, it was dismissed from the Chancery Court suit.

C. THE BANKRUPTCY PROCEEDINGS

Paverite's petition initiating the Chapter XI bankruptcy proceeding was filed on December 22, 1978. On January 8, 1979, ITT filed a Proof of Claim, totaling $481,250.48 (A-18). On October 18, 1979, Paverite filed its objection to this claim, which was based in part on ITT's wrongful attachment of its equipment (A-29). After that, ITT filed an Amended Proof of Claim (A-31).

Prior to this time, Paverite instituted an adversary proceeding in the Bankruptcy Court by filing a complaint against ITT for wrongful repossession and demanding damages therefor (A-20). On July 23, 1979, an Agreed Order was entered by the Honorable Clive W. Bare, Bankruptcy Judge, which:

1. Allowed to Paverite to retain part of its road building equipment with an allowance to ITT for economic depreciation;

2. Allowed ITT to repossess the remainder of the collateral; and,

3. Dismissed the complaint of Paverite against ITT *without prejudice.* (emphasis supplied) (A-26)

On October 2, 1979, ITT sold Paverite's equipment. To reflect the receipt of proceeds from the sale of the collateral, ITT filed an amended claim for an unsecured claim of $181,375.13 (A-31) No objection was made to the amended claim.

On November 23, 1979, a second Agreed Order was entered in the adversary proceeding granting ITT, in addition to its claim for expenses of administration, an unsecured claim of $150,633.01 (A-36). This Agreed Order neither explicitly or implicitly addresses, refers to, or much less adjudicates Paverite's claim of wrongful repossession.

On December 10, 1979, the Bankruptcy Court entered an Order confirming Paverite's Plan of Reorganization. An important part of this plan was the provision which allows for Paverite to bring court actions and states that one-half of the proceeds from any judgments obtained

by Paverite in courts of records during a three-year period following the plan's confirmation will be applied to the remaining balances of claims.

D. THE STATE COURT PROCEEDINGS

The instant action was initiated by Paverite and the McClellans (shareholders and guarantors) in the Circuit Court for Knox County, Tennessee, seeking damages for ITT's obtaining a writ of attachment *ex parte* by means of a false affidavit. This wrongful *ex parte* attachment resulted in Paverite's bankruptcy, in a judgment being rendered against the McClellans, in the distress sale of Paverite's road building equipment, and in the loss of business to Paverite.

Paverite and the McClellans filed their complaint in the Circuit Court for Knox County, Tennessee, on June 3, 1980, against ITT. ITT filed a motion for judgment based on the doctrine of *res judicata*. The Circuit Court found that the respective causes of action asserted by Paverite and the McClellans were barred by the doctrine of *res judicata*, and dismissed the complaint with prejudice. An order on the court's decision was entered on September 17, 1980 (A-37).

On October 15, 1980, Paverite and the McClellans filed a notice of appeal seeking appellate review of the Circuit Judge's decision in the Court of Appeals, for the Eastern Section of Tennessee. Upon oral argument on January 14, 1981, and the briefs of counsel, the Court of Appeals affirmed the decision of the Circuit Judge in a written opinion by Judge Clifford E. Sanders, entered on March 31, 1981 (A-39).

The Court of Appeals held, in short, that the Agreed Order entered in the bankruptcy court on November 23,

1979, reflects a consideration of all the pleadings then filed in the bankruptcy proceeding regarding the Paverite-ITT controversy.

Paverite and the McClellans then filed an application for permission to appeal to the Supreme Court of Tennessee which was denied, as was its petition to rehear (A-47, A-48). There being no federal question regarding the courts' action as to the McClellans, they do not seek a relief before this Court.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW FAILS TO APPLY PROPERLY RULES 914 and 713 OF THE FEDERAL BANKRUPTCY ACT OF 1898, AS AMENDED, IN DENYING ON THE GROUNDS OF *RES JUDICATA* A CORPORATION REORGANIZED UNDER CHAPTER XI OF SAID ACT ITS CAUSE OF ACTION AGAINST A FORMER CLAIMANT OF THE NOW-DISCHARGED BANKRUPT.

The bankruptcy judge never rendered a decision on the merits of Paverite's claim for wrongful repossession. The Court of Appeals, of Tennessee, however, found that the Agreed Order entered by the bankruptcy judge on November 23, 1979, was a final adjudication of this issue.

A. THE BANKRUPTCY RULES REFUTE THE HOLDINGS OF THE STATE COURTS

In reaching its decision, the Court of Appeals ignored the distinction between adversary cases and contested matters under the rules of bankruptcy. An understanding of this dichotomy is critical in reviewing the Agreed Order which has become central to this case. Only by

dealing with the different rules which attach to adversary cases and contested matters can it be determined what the Agreed Order really adjudicated.

Claims and objections to claims give rise to contested matters. 3 Collier's (14th ed.) §57. Contested matters are governed by Rule 914 of the Federal Bankruptcy Rules. Adversary cases are more akin to the typical civil case, and Part VII of the Act brings to adversary cases many of the rules that apply to the typical civil case. Yet, not all of these rules apply to contested matters.

The filing of a claim by a creditor in bankruptcy and an objection lodged thereto constitute a "contested matter." 3 Collier's (14th ed.) §57. Contested matters are distinguishable from "adversary proceedings," and different rules apply to each.

The rules set out in Part VII of the Bankruptcy Act of 1898, as amended, apply to *adversary* proceedings. Contested matters are governed by Rule 914. Included in Part VII is Rule 713, which in many ways parallels Rule 13(a) of the Federal Rules of Civil Procedure regarding compulsory and permissive counterclaims. Rule 914, while bringing to contested matters some of the rules of Part VII, does not provide for the application of Rule 713 to *contested* matters.[1] Thus, claims which arguably

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[1] The rationale for not applying all the rules of adversary proceeding to contested matters is the need for expeditious handling of claims. As stated in one treatise:

> There is a need, however, for an expeditious conclusion on the status of the alleged bankrupt. For this reason, the rules retain a distinction between adversary proceedings and contested matters. This is also the reason why only certain rules applicable to the former are made applicable to the latter by Rule 914. "There are important differences between adversary proceedings and contested matters; and all of the rules pertinent to adversary proceedings do not apply in contested or as otherwise directed by prior order of the Bankruptcy Court." 13 Collier's (14th ed.) §914.03

would be compulsory counterclaims in an *adversary* proceeding in bankruptcy are not viewed as such with respect to *contested* matters.

This conclusion is strengthened by reference to Rule 306(d) concerning secured claims. Rule 306(d) states:

> If a secured creditor files a proof of claim, the value of the security interest held by him as collateral for his claim shall be determined by the court, and the claim shall be allowed only to the extent it is enforceable for any excess of the claim over such value.

This rule is mandatory and allows no off-set or counterclaim for causes of action falling outside of the validity of the security interest itself. In this case Paverite has not challenged the validity of ITT's security interest. But, the point to be made is that the rules of bankruptcy in no respect require the trustee or a debtor-in possession to make claim on a separate cause of action in response to a proof of claim filed by a creditor.

A case which by logical inference bears out that a counterclaim is not compulsory in response to a filing of a proof of claim is *In Re Essex Properties*, 430 F. Supp. 1112 (N.D. Calif. 1977). In *Essex Properties*, the creditor filed an action in bankruptcy to terminate the automatic stay provisions of Rule 12-43(a). No doubt exists but that such an action is an adversary proceeding, requiring the application of Part VII of the Bankruptcy rules, which mandate the filing of compulsory counterclaims. The trustee filed counterclaims to the creditor's motion. The referee dismissed the counterclaims and the District Court affirmed on the basis that counterclaims alleging a cause of action different from the main action are not compulsory counterclaims in an adversary proceeding.

A fortiori, if such counterclaims are not compulsory in an *adversary* proceeding, they are not compulsory in a *contested* matter such as ITT's claim in bankruptcy. Thus an amended claim, and an Agreed Order entered thereon are not sufficient for the application of the doctrine of *res judicata* to a suit by the debtor on a separate cause of action.

The Court of Appeals completely ignores these issues of federal law in denying Paverite its day in court. Yet these issues are inherent in the Agreed Order upon which the Court of Appeals hinges its decision.

B. THE BANKRUPTCY PROCEEDINGS REFUTE THE HOLDINGS OF THE STATE COURTS

The Agreed Order is styled In Re: Paverite, Inc., debtor, Paverite, Inc., plaintiff, v. ITT Industrial Credit Company, defendant.[2] The style of the Agreed Order shows that it relates to the adversary proceeding initiated in the Bankruptcy Court by Paverite and not to the claim filed by ITT. The adversary proceeding filed by Paverite in the Bankruptcy Court asserted a claim for affirmative relief from ITT on the basis of wrongful repossession. This cause of action asserted by Paverite was dismissed by an Order entered by the Bankruptcy Judge on July 23, 1979, *without prejudice* to Paverite's refiling of the same. This Order also commanded Paverite to surrender approximately 44 pieces of its road building equipment to ITT and allowed ITT to recover from Paverite or its surety economic depreciation at

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[2] At the top left hand corner of the Agreed Order appears the initials of ITT's attorney, R. Thomas Stinnett, who prepared the Agreed Order (A-35).

the rate of $11,500.00 per month for the 24 pieces of equipment that the court allowed Paverite to keep. It is the pleadings in this adversary proceeding to which the first sentence of the Agreed Order of November 23, 1979, refers, where it states, "upon consideration of the pleadings filed in *this action*." (emphasis supplied) Paverite's allegation of wrongful repossession raised in those pleadings had been dismissed without prejudice.

There is no evidence that the Bankruptcy Judge considered Paverite's claim of wrongful repossession either as a ground for affirmative relief or as a defense to the claim of ITT filed in the Bankruptcy Court. Such a determination was not necessary. In allowing ITT an unsecured claim, the Bankruptcy Court was only required to determine whether ITT had a valid security interest in Paverite's road building equipment, whether the subsequent sale by ITT of that equipment was reasonable and should be confirmed; and, if so, what was the amount of the resulting deficiency still owed by Paverite to ITT. There was no need for the Bankruptcy Court to adjudicate Paverite's defense against ITT in making the judgment reflected in the Agreed Order of November 23, 1979.[3]

If the court had intended to rule on Paverite's defense (or if ITT's attorney had intended the order which he drafted to cover that claim), the Agreed Order could have been expressly so worded. The obvious implication from the above then is that the issue of ITT's wrongful repossession was clearly neither adjudicated nor

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[3] Of course by initiating the bankruptcy proceeding, Paverite came to be in default of its loan from ITT, and ITT had an unquestioned right to repossess and sell the collateral for its loan. The issue Paverite is attempting to litigate in this cause is whether ITT is liable to Paverite in damages for initiating a possessory action **ex parte** at a time when Paverite was not in default.

necessary to the Bankruptcy Court's determination. Therefore, the defense of *res judicata* has no application to the case at bar.

The cases relied upon by ITT and cited by the Court of Appeals do not call for a result different from the one expressed above. For example, *Pyle v. Pyle*, 134 Tenn. 370, 183 S.W. 1004 (1915), points out that it is essential that the "same right" must have been previously "adjudged" before the defense of *res judicata* comes into play.

The case of *United States v. Coast Wineries, Inc.*, 131 F.2d 643 (2nd Cir. 1932), is inapposite to the case at bar. That case involved a claim brought by the Internal Revenue Service against a bankrupt. The Bankruptcy Court entered an order on the claim of the IRS. The IRS, not being satisfied with its recovery in bankruptcy brought a subsequent suit against the bankrupt's surety. The court correctly concluded that the allowance of the claim in bankruptcy precluded the IRS bringing a later action against the bankrupt or anyone in privity with him. The *Coast Wineries* case goes on farther. The Second Circuit was not confronted with the situation at bar where a claim was raised by a bankrupt and never actually litigated or adjudicated in the Bankruptcy Court.

The Court of Appeals did not deal with the critical distinction between adversary cases and contested matters. But this distinction must be made before any court can say what was adjudicated by the bankruptcy court. Because the claim filed by ITT in the bankruptcy court initiated a contested matter, Paverite was not required to raise the issue of wrongful repossession in defense of that issue. That it was raised does not in and of itself prove that it was adjudicated by the bankruptcy court. In fact, it clearly was not adjudicated.

Such an analysis leads inescapeably to the conclusion that the Agreed Order neither necessarily nor in fact reflects adjudication of the claim now presented by Paverite.

CONCLUSION

Based upon the above points of law, plaintiffs-appellants respectfully petition the Court to issue a writ of certiorari to review the judgment of the Court of Appeals of Tennessee.

Respectfully submitted,

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October 26, 1981

Appendix

IN THE
CHANCERY COURT FOR KNOX COUNTY,
TENNESSEE, AT KNOXVILLE

ITT INDUSTRIAL CREDIT COMPANY, Plaintiff,	)	
v.	)	No. 65189 Part I
PAVERITE, INC., MELVIN J. McCLELLAN, and BETTY McCLELLAN, Defendants.	)	FILED DEC 21 1978

COMPLAINT

This is an action to recover personal property pursuant to Tenn. Code Ann. §23-2346, et seq., and for cause plaintiff would respectfully show to this Honorable Court:

1. Plaintiff is a corporation duly authorized to conduct business in the State of Tennessee with its principal place of business at 9041 Executive Park Drive, Knoxville, Knox County, Tennessee.

2. Paverite, Inc., hereinafter referred to as Paverite, is a Tennessee corporation with its principal place of business at Thorn Grove Pike, Knoxville, Knox County, Tennessee. Service of process may be had upon the defendant corporation by serving its president, Melvin J. McClellan, at the corporation's principal place of business.

3. Melvin J. McClellan and Betty McClellan are residents of Knox County, Tennessee and may be served with process at their residence, Crown Point Estates, Maryville, Blount County, Tennessee.

4. On or about August 30, 1978, Paverite executed an installment note in favor of plaintiff for the original aggregate amount of Four Hundred Fifty-nine Thousand Six Hundred Twenty-nine Dollars ($459,629.00), of which Four Hundred Two Thousand and Seven Hundred Seventy-five Dollars and Seventy-five Cents ($402,775.75) represented principal. A copy of said installment note is annexed hereto as Exhibit "1".

[2]

5. To secure payment of the aforesaid installment note, Paverite did, on or about August 30, 1978, execute a security agreement in favor of plaintiff, thereby securing unto plaintiff the following described equipment:

QUANTITY	DESCRIPTION	MODEL	SERIAL NO.
1	Hough Payloader	H80B	2281
1	Galion Roller	8-12 Ton	57032
1	Galion Roller	8-12 Ton	57741
1	Tampo Roller	RS-166A	24119
1	Rosco Distributor	RRH	6261
1	Phelan Lowboy	WT-35KHN	6889
1	Ill Wheel Tractor	2400B	200239
1	Blaw Knox Paver	PF180	PF18011-0545-029
1	Fruehauf Dump Trailer		FWR387501
1	Fruehauf Asphalt Tanker		UNR480708
1	Fruehauf Dump Trailer		FWS573706
1	Fruehauf Dump Trailer		FWJ324401
1	Fruehauf Dump Trailer		FWM769802
1	Fruehauf Dump Trailer		FWM829304
1	Fruehauf Dump Trailer		FWR508005
1	Fruehauf Dump Trailer		FWS668623
1	Fruehauf Dump Trailer		FWR511106
1	Fruehauf Dump Trailer		FWR511121
1	Fruehauf Dump Trailer		FWR511103
1	Fruehauf Dump Trailer		FWR540110

1	Fruehauf Dump Trailer		FWK406401
1	City Dump Trailer		S1126112
1	Transco Dump Trailer		ADT868765
1	Hobbs Dump Trailer		FHN821102
1	Hobbs Dump Trailer		FHM77804
1	Hobbs Dump Trailer		FHM77805
1	Hobbs Dump Trailer		FHS562601
1	Trailco Dump Trailer		8993
1	Harole Dump Trailer		HRD1300 AS9005
1	Raven Dump Trailer		28912892
1	Brook Dump Trailer		7327172718
1	Trailmobile Dump Trailer		H40149
1	Mack Tractor	F761ST	1553
1	Mack Tractor	F761ST	1537
1	Mack Tractor	F761ST	1573
1	Mack Tractor	F761ST	1564
1	Mack Tractor	F761ST	1580
1	Mack Tractor	F761ST	1601
1	Mack Tractor	F761ST	1598
1	Mack Tractor	F761ST	1583
1	Mack Tractor	F761ST	1557
1	Mack Tractor	F761ST	1578
1	Mack Tractor	F761ST	1595
1	Mack Tractor	F761ST	1587
1	Mack Tractor	F761ST	1565
1	Mack Tractor	F761ST	1561
1	Mack Tractor	F761ST	1576
1	Mack Tractor	F761ST	1541
1	Mack Tractor	F761ST	1572
1	Mack Tractor	F761ST	1558
1	Mack Tractor	F761ST	1624
1	Mack Tractor	F761ST	1594
1	Mack Tractor	F761ST	1593
1	Mack Tractor	F761ST	1600
1	Mack Tractor	F761ST	1570
1	Mack Tractor	F761ST	1568
1	Mack Tractor	F761ST	1554

[3]

1	Mack Tractor	F761ST	1566
1	Mack Tractor	F761ST	1569
1	Mack Tractor	F761ST	1550
1	Mack Tractor	F761ST	1562
1	Mack Tractor	F761ST	1591
1	Ford Truck	350	37SUY41706
1	Hough Payloader	H8013	2307
1	Caterpillar Diesel Engine	D346TA	395959E26282

1	Marathon Generator	400KW	
1	Chevrolet Tandem Dump	J11973	CJ1934V110988

6. A copy of said security agreement is annexed hereto as Exhibit "2".

7. Paverite has failed and refused to make the first payment on the aforesaid installment note and each subsequent installment thereto.

8. As provided in said note and security agreement, plaintiff hereby declares the unpaid portion thereof immediately due and payable.

9. After all credits to which Paverite may be entitled are given, the remaining unpaid balance of the note is Four Hundred Thirty-seven Thousand Five Hundred Dollars and Forty-eight Cents ($437,500.48), together with interest from and after December 21, 1978, for which demand is hereby made.

10. Plaintiff retains a perfected security interest in the aforesaid equipment. Copies of the financing statements (UCC-1) and certificates of title are annexed hereto as Exhibits "3-59".

11. Paverite is seriously impairing the plaintiff's security interest in the property, in that proper insurance as provided by the security agreement will be cancelled as of 12:01 a.m. on December 24, 1978. A copy of the notice of cancellation of insurance is annexed hereto as Exhibit "60".

12. Plaintiff may suffer immediate and irreparable damage unless this Court issues an immediate writ of possession pursuant to Tenn. Code Ann. §23-2346.

13. The note and security agreement provides, inter alia, for a reasonably attorney's fee, for which demand is hereby made.

[4]

14. The equipment has an estimated present value of Four Hundred Thousand Dollars ($400,000.00).

15. Melvin J. McClellan and Betty McClellan have individually guaranteed the indebtedness of Paverite to plaintiff and are made parties to this action so that plaintiff may recover from them any deficiency. A copy of their personal guaranty is annexed hereto as Exhibit "61".

PREMISES CONSIDERED, PLAINTIFF PRAYS:

1. That an immediate writ of possession be issued in accordance with Tenn. Code Ann. §23-2346.

2. That process issue and be served upon the defendants and that they be required to answer this complaint, verification thereof is waived, however.

3. That a possessory hearing be held at the earliest date convenient with the Court.

4. That following the possessory hearing, this action be retained by the Court for determination and adjudication of deficiency, if any.

5. For such other, further, and general relief to which plaintiff may be entitled.

/s/ R. THOMAS STINNETT
R. Thomas Stinnett
Attorney for ITT Industrial
Credit Company

OF COUNSEL:

Stone & Hinds, P.C.
700 Park National Building
P. O. Box 2526
Knoxville, Tennessee 37901

[5]

OATH

STATE OF TENNESSEE)
) ss
COUNTY OF KNOX)

I, Harry D. Chance, being first duly sworn, deposes and says:

That I am the regional manager for the plaintiff in this action and that the statements contained in the foregoing complaint are true to the best of my knowledge, information and belief.

Witness my hand this 21st day of December, 1978.

/s/ HARRY D. CHANCE
Harry D. Chance

Sworn to and subscribed before me this 21st day of December, 1978.

/s/ R. THOMAS STINNETT
Notary Public

My commission expires: 10/18/82.

COST BOND

We acknowledge ourselves sureties for the costs of this cause not to exceed Two Hundred Fifty Dollars ($250.00).

Stone & Hinds, P. C.

By /s/ R. THOMAS STINNETT
R. Thomas Stinnett

[6]

STATE OF TENNESSEE)
) ss
COUNTY OF KNOX)

TO THE SHERIFF OF KNOX COUNTY:

I command you to summon the defendants, Paverite, Inc., Melvin J. McClellan, and Betty McClellan, to appear before the Honorable Frederick D. McDonald, Chancellor for Knox County, Tennessee, on the 5th day of January, 197_, at 9:30 a.m., and answer the complaint of the plaintiff, ITT Industrial Credit Company, for recovery of the following property:

[See Appendix pages A-2—A-4 for list of property.]

[7]

Dated this 21st day of December, 1978.

H. David Cate,
Clerk and Master

By /s/ H. DAVID CATE

WAIVER

I, Melvin J. McClellan, president of Paverite, Inc., a defendant herein, being authorized to do so, acknowledge that ITT Industrial Credit Company is entitled to possession of the described property, and I hereby voluntarily waive any right to a hearing by tendering the property herewith

to the officer and acknowledge that if I do not appear and answer as to the entire matter on the date specified herein, a default judgment may be entered against Paverite, Inc.

Paverite, Inc.

By _____
Melvin J. McClellan, President

[8]

[Caption Omitted]

BOND

We, ITT Industrial Credit Company, principal, and Insurance Company of North America, surety, acknowledge ourselves indebted to Paverite, Inc., a defendant in this action, in the penal sum of $400,000.00, being no less than the value of the property described in the complaint herein; but this obligation to be void upon the condition that plaintiff pay the costs and damages adjudged against it and shall abide by and perform the judgment of the Court.

This 21st day of December, 1978.

PRINCIPAL:
ITT INDUSTRIAL CREDIT COMPANY

By /s/ HARRY D. CHANCE
Harry D. Chance, Regional Manager

SURETY:
INSURANCE COMPANY OF NORTH AMERICA

By /s/ LAVONNE SHERROD
Authorized Agent
Attorney-in-Fact

EXHIBIT B

[Caption Omitted]

WRIT OF POSSESSION

STATE OF TENNESSEE)
)
COUNTY OF KNOX)

TO ANY LAWFUL OFFICER:

Plaintiff having made application to the Court upon affidavit for the issuance of a writ of possession pursuant to Tenn. Code Ann. §23-2346, and having posted bond in the amount of $400,000.00 to secure defendants according to law, you are hereby directed to take out of the possession of the defendants and deliver to the plaintiff the following described equipment:

QUANTITY	DESCRIPTION	MODEL	SERIAL NO.
1	Hough Payloader	H80B	2281
1	Galion Roller	8-12 Ton	57032
1	Galion Roller	8-12 Ton	57741
1	Tampo Roller	RS-166A	24119
1	Rosco Distributor	RRH	6261
1	Phelan Lowboy	WT-35KHN	6889

1	IH Wheel Tractor	2400B	200239
1	Blaw Knox Paver	PF180	PF180H-0545-029
1	Fruehauf Dump Trailer		FWR387501
1	Fruehauf Asphalt Tanker		UNR489708
1	Fruehauf Dump Trailer		FWS573706
1	Fruehauf Dump Trailer		FWJ324401
1	Fruehauf Dump Trailer		FWM769802
1	Fruehauf Dump Trailer		FWM629304
1	Fruehauf Dump Trailer		FWR508005
1	Fruehauf Dump Trailer		FWS668623
1	Fruehauf Dump Trailer		FWR511106
1	Fruehauf Dump Trailer		FWR511121
1	Fruehauf Dump Trailer		FWR511103
1	Fruehauf Dump Trailer		FWR540110
1	Fruehauf Dump Trailer		FWK406401
1	City Dump Trailer		S1126112
1	Transco Dump Trailer		ADT868765

[2]

1	Hobbs Dump Trailer		FHN821102
1	Hobbs Dump Trailer		FHM777804
1	Hobbs Dujp Trailer		FHM777805
1	Hobbs Dump Trailer		FHS562601
1	Trailco DumpTrailer		8993
1	Harole Dump Trailer		HRD1300 AS9005
1	Raven Dump Trailer		28912892
1	Brook Dump Trailer		7327172718
1	Trailmobile Dump Trailer		H40149
1	Mack Tractor	F761ST	1553
1	Mack Tractor	F761ST	1537
1	Mack Tractor	F761ST	1573
1	Mack Tractor	F761ST	1564
1	Mack Tractor	F761ST	1580
1	Mack Tractor	F761ST	1601
1	Mack Tractor	F761ST	1598
1	Mack Tractor	F761ST	1583
1	Mack Tractor	F761ST	1557
1	Mack Tractor	F761ST	1578
1	Mack Tractor	F761ST	1595
1	Mack Tractor	F761ST	1587
1	Mack Tractor	F761ST	1565
1	Mack Tractor	F761ST	1561
1	Mack Tractor	F761ST	1576
1	Mack Tractor	F761ST	1541
1	Mack Tractor	F761ST	1572
1	Mack Tractor	F761ST	1558

1	Mack Tractor	F761ST	1624
1	Mack Tractor	F761ST	1594
1	Mack Tractor	F761ST	1593
1	Mack Tractor	F761ST	1600
1	Mack Tractor	F761ST	1570
1	Mack Tractor	F761ST	1568
1	Mack Tractor	F761ST	1554
1	Mack Tractor	F761ST	1566
1	Mack Tractor	F761ST	1569
1	Mack Tractor	F761ST	1550
1	Mack Tractor	F761ST	1562
1	Mack Tractor	F761ST	1591
1	Ford Truck	350	37SUY41706
1	Hough Payloader	H8013	2307
1	Caterpillar Diesel Engine	D346TA	395959E26282
1	Marathon Generator	400KW	
1	Chevrolet Tandem Dump	J11973	CJ1934V110988

This 21st Day of December, 1978.

/s/ FREDERICK D. McDONALD
Chancellor

[Caption Omitted]

OPINION OF THE COURT

(Filed December 6, 1979)

[2]

Opinion of the Court

THE COURT: The Court Reporter is requested to type the Opinion of the Court and submit it to us for review and any appropriate corrections, and to be signed and filed. The Judgment to be entered shall incorporate it by reference.

This is a lawsuit brought by ITT Industrial Credit Company as Plaintiff against Paverite, Inc. and Melvin J. and Betty McClellan. The suit today is being tried only with respect to the McClellans, because Paverite, Inc. is under the jurisdiction of the Federal Bankruptcy Court under Chapter 11 of the Bankruptcy Act.

It appears that Paverite, Inc. is indebted to Plaintiff, ITT, and gave a security interest in a large quantity of equipment owned by Paverite to secure this indebtedness. Paverite is in the asphalt paving business, and the equipment involved is that associated with such business.

The indebtedness to ITT owed by Paverite was in excess of some $400,000, and the McClellans, Mr. McClellan owning some ninety-percent of Paverite, had signed a Guaranty Agreement, Exhibit 2 in this case, and attached to the Complaint as Exhibit 61-A and 61-B. Also, Exhibit 1 to the Complaint is the Installment Note.

[3]

In the early part of December 1978, Paverite was in default on three $27,037 payments, and ITT brought this

suit to seize and recover the equipment that stood as security for the note.

The parties have stipulated, that as of today, the total amount owed on the note, subject only to the validity of the defenses of the guarantors, is $177,965.38.

Because Paverite, Inc. is in Chapter 11 proceedings in the Bankruptcy Court and that Court has issued a stay of proceedings against Paverite, this action has not proceeded as to Paverite, and we thus consider only the defenses that the McClellans have raised against their liability as guarantors.

They raise two defenses. First, they contend that when the Writ of Possession was obtained by Plaintiff, ITT, on December 21, 1978, the allegations in the Complaint, that Plaintiff's security was being impaired, was not correct and, thus, the attachment was wrongfully obtained; that because of the wrongful suing out of the Writ, Paverite has suffered serious damages, and that the McClellans are entitled to the benefit thereof.

Secondly, Defendants contend that ITT

[4]

was in contempt of the Federal Bankruptcy Court by having seized the property after the filing of the Chapter 11 proceedings.

We will consider these defenses in reverse order. We're not convinced on the evidence, that Plaintiff was in contempt of the Federal Bankruptcy Court. It is clear from the evidence, that as soon as the paperwork from the Chapter 11 proceedings were delivered to the site where Plaintiff was undertaking to seize the involved equipment, Plaintiff immediately ceased its activity. We do not think it appropriate that this Court should determine whether anyone is in contempt of some other Court. There's no showing that Plaintiff, ITT, has been found in

contempt of the Federal Court Order or in violation thereof. That being the case, we do not think that Plaintiff's activities relative to the Bankruptcy Court Orders constitute any defense, that the McClellans may raise to their guaranty liability.

Next, we return to the question of the claim of the wrongful obtaining of the Writ of Possession. Defendants contend that the facts do not support ITT's claim, that ITT's security was being impaired.

The basic allegation in Plaintiff's

[5]

Complaint with respect to impairment of Plaintiff's security interest is that proper insurance, as provided for by the Security Agreement, will be canceled as of 12:01 a.m. on December 24, 1978. A copy of the Notice of Cancellation was attached to the Complaint.

On the evidence before us, I think we must fairly conclude, that Paverite in fact had extended the insurance, and that there in fact never was any danger of impairment of security by reason of lack of insurance on the secured property.

What effect does that have in this case? Defendants contend that because of the nature of the relief sought by Plaintiff and the difficulty in dealing with it and the need for immediate action by Paverite, the only safe and prudent course for it, upon learning that there had been an Attachment obtained, was to file Federal Chapter 11 Bankruptcy proceedings.

We think that was a matter of judgment and it would be difficult, if not impossible, to dispute that action as improperly taken.

Paverite, according to the McClellans, was about to refinance and reorganize its business through a transaction with a Mr. Hoover, who owned and operated a similar business in Nashville. When

[6]

Mr. Hoover learned that Paverite had gone into Chapter 11 proceedings, he withdrew from the proposed reorganization. The question then is, was it so certain, that the reorganization would occur and Paverite's default be corrected, so that it suffered consequential damages from the Plaintiff's apparent suing out of the Attachment?

We think that we cannot conclude from the evidence before us, and it's difficult to imagine such evidence, that would lead to a conclusion, that Mr. Hoover's involvement with Paverite would have avoided McClellan's obligations. Mr. McClellan testified, that Mr. Hoover planned on trying to get the existing creditors, apparently including ITT, to go along with a reorganization, and if that was impossible, he would talk to other companies or individuals. We think that the evidence points out the difficulty in reorganizing and avoiding financial disaster as was apparently faced by Paverite in this case.

It's not unreasonable to conclude, that once Paverite became entangled in legal proceedings, such as Chapter 11 proceedings and these proceedings, Mr. Hoover would withdraw. It's very difficult to say, that had this Attachment not been issued, that the company would have been successfully reorganized.

[7]

Further, we can't ignore the fact, that Paverite had defaulted for three straight months in making its payments to ITT, and it had had financial difficulties for apparently over a year and some additional months.

We think it is just too speculative to conclude, that satisfactory arrangements would have resulted here through Mr. Hoover but for the suing out of the Attachment. We further think, that perhaps one of the considerations in Chapter 11 proceedings being instituted was that there were other unpaid creditors, and this situation having gone on for a long period of time, Paverite was in imminent danger of bankruptcy proceedings in any event.

Paverite could perhaps have attempted to come into this Court immediately and have the Attachment dissolved, but as counsel for Mr. McClellan says and frankly observes, and I don't think you could make any other observation, that upon a hearing, the Court may well have granted the Attachment in any event.

Considering all of the evidence before us, it's difficult to see how this Court or any Court could have denied Plaintiff its right to seize the property. That being the case, we don't think that the

[8]

guarantors may benefit from the fact, that the Affidavit did not correctly state the facts that brought about the Attachment, and Judgment will be entered against them in the amount stipulated.

However, we're going to make a further observation. These proceedings do continue as to Paverite and are under stay from the Federal Bankruptcy Court. This hearing today does not prevent, and we rule that it does not prevent Paverite from asserting and obtaining a Judgment for any direct damages it can show because the Affidavit was not in fact accurate. Paverite may litigate the wrongfulness of having the Writ issued. To

the extent that Paverite can show damages to it by reason of the Attachment having been taken out, the Defendants will be entitled to credit on the amount of the Guaranty.

It would appear, although we are not making a decision in advance, that some equipment was held by ITT under a Writ of Possession that should not have been issued. At the time that equipment was returned, it may be that Paverite had some claim, at least the rental value of that equipment for the period that it was withheld from them.

A Judgment may be entered as to the

[9]

McClellans and costs of the action will be taxed against them insofar as the proceedings relate to them. Costs associated with the Attachment should not be and will not be taxed against the McClellans. In fact, I think what we should do is tax one-half of the costs not having to do with the Attachment against the McClellans since the corporate Defendant has liability as the principal, which may be asserted against it.

Is there anything that we have not covered, that we should have covered?

MR. STINNETT: Your Honor, just a question that I have with respect to this matter about Paverite. Are we leaving the case open? I didn't understand what the Court said.

THE COURT: The case, as I understand, stands with Paverite remaining a Defendant, but no procedings can be had because of the stay in Federal Court. Whatever will happen to that aspect of the case, I don't know now.

/s/ FREDERICK D. McDONALD
Chancellor

UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee

In re	)	
PAVERITE, INC.	)	Bankruptcy No. BK-3-78-646
Bankrupt	)	

FILED JAN 8 1979

PROOF OF CLAIM

* * *

[If claim is made by agent] The undersigned, who resides at P. O. Box 2526, Knoxville, TN 37901 , is the agent of ITT Industrial Credit Company , of P. O. Box 10125, Knoxville, TN 37919 , and is authorized to make this proof of claim on behalf of the claimant.

2. The bankrupt was, at the time of the filing of the petition initiating this case, and still is indebted [or liable] to the claimant, in the sum of $437,500.48 (Plus reasonable attorney's fees and expenses).

3. The consideration for this debt [or ground of liability] is as follows:

Installment Note, dated August 30, 1978

4. [If the claim is founded on writing] The writing on which this claim is founded (or a duplicate thereof) is attached hereto [or cannot be attached for the reason set forth in the statement attached hereto]. Exhibit 1

* * *

6. No judgment has been rendered on the claim except Writ of Possession.

Bankruptcy Proof of Claim

7. The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. This claim is not subject to any set-off or counter-claim except

9. No security interest is held for this claim except Security Agreement, dated August 30, 1978 (Exhibit 2)

[If security interest in property of the debtor is claimed] The undersigned claims the security interest under the writing referred to in paragraph 4 hereof [or under a separate writing which (or a duplicate of which) is attached hereto, or under a separate writing which cannot be attached hereto for the reason set forth in the statement attached hereto]. Evidence of perfection of such security interest is also attached hereto. Exhibits 3-59

10. This claim is a general unsecured claim, except to the extent that the security interest, if any, described in paragraph 9 is sufficient to satisfy the claim. [If priority is claimed, state the amount and basis thereof.]

11. This claim is filed as a(n) (~~Unsecured~~ / Secured / ~~Priority~~) CLAIM.

$481,250.48 ***
Total Amount Claimed

Name of Creditor: ITT Industrial Credit Company

Stone & Hinds, P.C.
by /s/ R. THOMAS STINNETT
R. Thomas Stinnett, Attorney for
ITT Industrial Credit Company

Dated:
January 8, 1979

*** includes $43,750.00 as attorney's fees and expenses

EXHIBIT B

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

In Re:	)	
PAVERITE, INC.,	)	
Debtor	)	
PAVERITE, INC.,	)	Bankruptcy No. BK-3-78-646
Plaintiff	)	
v.	)	FILED APR 23 1979
ITT INDUSTRIAL CREDIT COMPANY,	)	
Defendant	)	

COMPLAINT

Plaintiff would show to the Court the following:

1. Plaintiff filed a voluntary petition instituting this case under Chapter XI of the Bankruptcy Act on December 22, 1978, at 10:55 AM.

2. On December 21, 1978, defendant filed a complaint in the Chancery Court for Knox County, Tennessee, styled "ITT Industrial Credit Company vs. Paverite, Inc., et al.", Rule Docket No. 65189, at 12:10 PM. A true and correct copy of that complaint is attached hereto as an exhibit and

incorporated herein by reference as fully as if copy herein verbatim.

3. Pursuant to said complaint, and in particular in reliance upon the allegation in said complaint that Paverite was "seriously impairing the plaintiff's security interest in the property ...", the Honorable Fredrick D. McDonald, Chancellor, issued a writ of possession, a true and correct copy of which is attached as an additional exhibit to this complaint.

4. At the time said complaint was filed and presented to the Chancellor, Paverite was not seriously impairing the plaintiff's security interest in the property and the plaintiff was not in danger of suffering immediate and irreparable damage within the meaning of T.C.A. § 23-2346.

[2]

5. Pursuant to the aforesaid writ of possession, the Sheriff of Knox County, through his duly authorized deputies and agents, caused to be repossessed from the premises of Paverite, Inc. the following described property:

(1) Mack Tractor, S/N 1561;
(2) Mack Tractor, S/N 1565;
(3) Mack Tractor, S/N 1593;
(4) Mack Tractor, S/N 1576;
(5) Mack Tractor, S/N 1562;
(6) Mack Tractor, S/N 1541;
(7) Mack Tractor, S/N 1568;
(8) Chevrolet Dump Truck, S/N CJ1934V110988;
(9) Hobbs Trailer, S/N FHM777805;
(10) Trailco Trailer, S/N 8993;
(11) Freuhauf Trailer, S/N FWM769802;
(12) Freuhauf Trailer, S/N FWR387501.

6. A substantial number of the foregoing items were repossessed after Paverite, Inc. filed the petition instituting this case, in violation of the stay of Rule 11-44 of the Rules of Bankruptcy Procedure.

7. At the time of said repossession, the aforesaid property was not being operated by Paverite, Inc. and insurance thereon was in full force and effect.

8. As a result of the illegal, arbitrary, and capricious actions of ITT Industrial Credit Company, Paverite, Inc. was forced to seek the protection of this Court. Paverite, Inc. would not have been required to file a petition under Chapter XI but for the complaint having been filed by ITT Industrial Credit Company as aforesaid.

9. As a result of the filing of the complaint by ITT Industrial Credit Company and the issuance of a writ of possession ex parte, Paverite, Inc. has been damaged in the amount of $2,500,000.00, and plaintiff demands judgment against defendant for $2,500,000.00 plus $500,000.00 punitive damages.

[3]

10. At the time of the filing of the petition instituting this case, Paverite, Inc. had partially performed certain contracts with the State of Tennessee for paving of certain roads, specifically, Contract No. 7941 and Contract No. 7942 for the paving of roads located in Knox County, Tennessee. Said contracts contain substantial profit for Paverite, Inc. if they are completed.

11. Exchange Mutual Insurance Company has entered into an agreement with Paverite, Inc. under the terms of which Exchange Mutual will provide certain operating capital for Paverite, Inc. for the purpose of completing the aforesaid contracts. It is in the best interests of

Paverite, Inc. and its creditors that said contracts be completed as expeditiously as possible.

12. In order to complete said contracts, plaintiff needs to use all of the equipment wrongfully repossessed by ITT Industrial Credit Company.

13. Paverite, Inc. proposes to pay to ITT Industrial Credit Company the amount of economic depreciation on all equipment in which ITT Industrial Credit Company holds a validly perfected security interest during the time said equipment is being operated by Paverite, Inc. in the completion of the aforesaid contracts, as such amount may be set by this Court from time to time.

14. Time is of the essence for the aforesaid contracts, in that Paverite, Inc. will be liable for liquidated damages if said contracts are not completed rapidly. Paverite, Inc. is ready, willing, and able to begin performance and completion thereof but for the fact that defendant ITT Industrial Credit Company holds and refuses to release to plaintiff the above described equipment.

[4]

15. Plaintiff avers and verily believes that it is entitled to the issuance of a temporary injunction ordering and directing the defendant ITT Industrial Credit Company to release to it forthwith the above described equipment so that it may begin completion of the aforesaid contracts.

Wherefore, premises considered, plaintiff prays as follows:

1. That it have judgment against the defendant, ITT Industrial Credit Company, for $2,500,000.00 compensatory damages and $500,000.00 punitive damages.

2. That a temporary injunction issue directing that the aforesaid equipment be delivered from ITT Industrial Credit Company to the plaintiff forthwith and that upon hearing said injunction be made permanent.

3. That the plaintiff have such other and further relief as may be appropriate in the premises.

THIS IS THE FIRST APPLICATION FOR A TEMPORARY INJUNCTION IN THIS CASE.

/s/ JOHN A. WALKER, JR.
John A. Walker, Jr.
Attorney for Plaintiff
Fowler & Robertson
Seventh Floor
First Tennessee Bank Bldg.
Knoxville, Tennessee 37902

STATE OF TENNESSEE
COUNTY OF KNOX

Melvin J. McClellan, being first duly sworn, makes oath that he is the President of Paverite, Inc., that he has read the foregoing complaint, and that the statements contained therein are true to the best of his knowledge, information, and belief.

This 20th day of April, 1979.

/s/ MELVIN J. McCLELLAN
Melvin J. McClellan
[5]

Sworn to and subscribed before
me this 20th day of April, 1979.

/s/ JOHN A. WALKER, JR.
Notary Public

My commission expires:

June 29, 1982

NOTICE OF HEARING

To defendant ITT Industrial Credit Company, its agents and attorneys:

Take notice that the foregoing complaint and application for a temporary injunction will come on to be heard before the Honorable Clive W. Bare, Bankruptcy Judge, on the 25th day of April, 1979, at 1:30 p.m., or as soon thereafter as counsel may be heard, in Room 214, Bankruptcy Court Room, United States Post Office and Courthouse, Knoxville, Tennessee.

/s/ JOHN A. WALKER, JR.
John A. Walker, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing complaint upon R. Thomas Stinnett, Attorney of Record for defendant ITT Industrial Credit Company, by hand delivery, this 20th day of April, 1979.

/s/ JOHN A. WALKER, JR.
John A. Walker, Jr.

EXHIBIT C

[U. S. District Court Caption Omitted]

ORDER

(Filed July 23, 1979)

Upon consideration of the pleadings filed in this action, and the agreement of the parties, it is

ORDERED:

1. That the debtor retain for use in the operation of its business the following equipment:

1977 Ford 1-ton Truck, S/N F37SUY41706
1975 Chevrolet Tandem Dump Truck, S/N CJ1934V110988
1973 Mack Tractor, S/N 1593
1973 Mack Tractor, S/N 1561
1973 Mack Tractor, S/N 1566
1973 Mack Tractor, S/N 1553
1973 Mack Tractor, S/N 1568
Fruehauf Dump Trailer, S/N FWM769802
Fruehauf Dump Trailer, S/N FWR511103
Fruehauf Dump Trailer, S/N FWR387501
Fruehauf Dump Trailer, S/N FWS668623
Hobbs Dump Trailer, S/N FHN821102
Hobbs Dump Trailer, S/N FHS562601
Fruehauf Dump Trailer, S/N FWJ324401
Fruehauf Dump Trailer, S/N FWR392702
1975 Hough H80 B Loader, S/N 2307
1975 Hough H80 B Loader, S/N 2281
1975 Blaw Knox Paver, S/N PF180H-0545-029
1975 International Tractor Sweeper, S/N 200239

1975 Galion Roller, S/N 57032
1975 Galion Roller, S/N 57741
1975 Phelan Lowboy, S/N 6889
1975 Tampo Roller, S/N 24119
1974 Fruehauf Asphalt Tandem, S/N UNR489708

[2]

2. That the following equipment, which is subject to a perfected security interest in favor of ITT Industrial Credit, be surrendered to ITT Industrial Credit Company forthwith:

Fruehauf Dump Trailer, S/N FWK406401
Fruehauf Dump Trailer, S/N FWR540110
Fruehauf Dump Trailer, S/N FWR511121
Fruehauf Dump Trailer, S/N FWS573706
Fruehauf Dump Trailer, S/N FWM629304
Fruehauf Dump Trailer, S/N FWR508005
Fruehauf Dump Trailer, S/N FWR511106
Rosco Distributor, S/N 6261
City Dump Trailer, S/N S1126112
Transco Dump Trailer, S/N ADT868765
Hobbs Dump Trailer, S/N FHM777804
Hobbs Dump Trailer, S/N FHM777805
Trailco Dump Trailer, S/N 8993
Harole Dump Trailer, S/N HRD1300 AS9005
Raven Dump Trailer, S/N 28912892
Brook Dump Trailer, S/N 7327172718
Trailmobile Dump Trailer, S/N H40149
Caterpillar Diesel Engine, S/N 395959E26282
Marathon Generator, S/N 400KW
Mack Tractor, S/N 1537
Mack Tractor, S/N 1573
Mack Tractor, S/N 1564
Mack Tractor, S/N 1580
Mack Tractor, S/N 1601

Mack Tractor, S/N 1598
Mack Tractor, S/N 1583
Mack Tractor, S/N 1557
Mack Tractor, S/N 1578
Mack Tractor, S/N 1595
Mack Tractor, S/N 1587
Mack Tractor, S/N 1565
Mack Tractor, S/N 1576
Mack Tractor, S/N 1541
Mack Tractor, S/N 1572
Mack Tractor, S/N 1558
Mack Tractor, S/N 1624
Mack Tractor, S/N 1594
Mack Tractor, S/N 1600
Mack Tractor, S/N 1570
Mack Tractor, S/N 1554
Mack Tractor, S/N 1569
Mack Tractor, S/N 1550
Mack Tractor, S/N 1562
Mack Tractor, S/N 1591

3. That for use of the equipment specified in Paragraph 1, the debtor pay to ITT Industrial Credit Company within three (3) business days, economic depreciation of Eleven Thousand, Five Hundred Dollars ($11,500) per month commencing as of April 15, 1979, for the said equipment.

[3]

4. That the complaint of Paverite, Inc. against ITT Industrial Credit Company be and is hereby dismissed without prejudice.

Enter at Knoxville, this 23 day of July, 1979.

/s/ CLIVE W. BARE
Clive W. Bare
Bankruptcy Judge

Approved for Entry:

/s/ R. THOMAS STINNETT
R. Thomas Stinnett, Attorney
for Defendant

/s/ John A. Walker by R. T. Stinnett
per verbal authority given 7/29/79
John A. Walker, Jr., Attorney
for Plaintiff

[U. S. District Court Caption Omitted]

OBJECTION TO CLAIM

(Filed October 19, 1979)

The debtor hereby objects to claim number 4 filed in this case on January 8, 1979, by ITT Industrial Credit Company in the amount of $481,250.48, and in support of the objection would show to the Court the following:

1. The installment note upon which the claim is predicated is usurious, in that the interest rate thereon is excess of 18%.

2. On December 21, 1978, claimant filed a complaint in the Chancery Court for Knox County, Tennessee, in which the claimant alleged that the debtor was "seriously impairing the [claimant's] security interest in the property" and based on that allegation obtained a Writ of Possession

from the Knox County Chancery Court. At the time said complaint was filed and presented to the Court, the debtor was not seriously impairing the plaintiff's security interest in the property and the plaintiff was not in danger of suffering immediate and irreparable damage within the meaning of TCA §23-2346. As a result of the illegal, arbitrary, and capricious actions of the claimant, the debtor was forced to seek the protection of this Court by filing a petition under Chapter XI of the Bankruptcy Act. As a result of the filing of the complaint and the issuance of the Writ of Possession ex parte, the debtor suffered substantial damages, in excess of the amount of the claimant.

Wherefore, the debtor prays the judgment of the Court on its objection to the claim of ITT Industrial Credit Company.

This 18th day of October, 1979.

/s/ JOHN A. WALKER, JR.
John A. Walker, Jr.
Attorney for Debtor

[2]

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Objection on R. Thomas Stinnett, Attorney for the claimant, by hand delivery this 19th day of October, 1979.

/s/ JOHN A. WALKER, JR.
John A. Walker, Jr.
Attorney for Debtor.

[U. S. District Court Caption Omitted]

AMENDED PROOF OF CLAIM

(Filed October 19, 1979)

* * *

[If claim is made by agent] The undersigned, who resides at P. O. Box 2526, Knoxville, Tennessee 37901, is the attorney for ITT Industrial Credit Company, of P. O. Box 10125, Knoxville, Tennessee 37919, and is authorized to make this proof of claim on behalf of the claimant.

2. The bankrupt was, at the time of the filing of the petition initiating this case, and still is indebted [or liable] to this claimant, in the sum of $181,375.13.

3. The consideration for this debt [or ground of liability] is as follows: Installment note dated August 30, 1978.

4. [If the claim is founded on writing] The writing on which this claim is founded (or a duplicate thereof) is attached hereto [or cannot be attached for the reason set forth in the statement attached hereto].

5. [If appropriate] This claim is founded on an open account, which became [or will become] due on , as shown by the itemized statement attached hereto. Unless it is attached hereto or its absence is explained in an attached statement, no note or other negotiable instrument has been received for the account or any part of it.

6. No judgment has been rendered on the claim except None.

7. The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. This claim is not subject to any setoff or counter-claim except None.

9. No security interest is held for this claim except None.

10. This claim is a general unsecured claim, except to the extent that the security interest, if any, described in paragraph 9 is sufficient to satisfy the claim. [If priority is claimed, state the amount and basis thereof.]

(SEE REVERSE)

11. This claim is filed as a(n) (Unsecured) (~~Secured~~--) CLAIM. (Priority)

$181,375.13
Total Amount Claimed

Name of Creditor: ITT Industrial Credit Company

Signed: /s/ R. THOMAS STINNETT
Attorney for ITT Industrial Credit Company

Amended Proof of Claim

[2]

[Reverse]

STATEMENT OF CLAIM

Gross balance		$459,629.00
Less: Economic depreciation received		(37,566.67)
Proceeds from sale of collateral		(257,633.25)
Add: Repossession and advertising Expense		1,946.05
Attorney's fees		15,000.00
	TOTAL	$181,375.13

$154,541.80	unsecured
26,833.33	priority, based on economic depreciation for two months, 10 days (July 23-October 2) per order filed July 23, 1979.
$181,375.13	

INSTALLMENT NOTE

At: Knoxville, Tennessee Date: August 30, 1978

FOR VALUE RECEIVED, the undersigned promises to pay to the order of ITT Industrial Credit Company, a Nevada corporation at its office located at

9041 Executive Park Drive (P. O. Box 10125)

Knoxville, Tennessee , or at such place as the legal holder hereof may from time to time appoint in writing, the aggregate sum of Four Hundred Fifty-Nine Thousand Six Hundred Twenty-Nine and No/100 ----------Dollars ($459,629.00) payable in 17 monthly installments according to the following schedule:

4 consecutive monthly installments of $27,037.00 each commencing the Fifth day of October , 1978.

10 consecutive monthly installments of $27,037.00 each commencing the Fifth day of April , 1979.

3 consecutive monthly installments of $27,037.00 each commencing the Fifth day of April , 1980.

__ consecutive monthly installments of $ each commencing the day of , 19 .

If any installment is in arrears not less than ten (10) days after due date, the undersigned agrees to pay a delinquency and collection charge of five cents ($.05) per dollar on, and in addition to the amount of said installment, but in any event not exceeding the maximum lawful charges. The makers and endorsers hereby severally waive presentment, demand, protest, notice of protest and notice of dishonor.

If default be made in the payment of any of said installments or of any provisions of the Security Agreement, the

aggregate sum above mentioned or any balance unpaid thereon, shall at the option of the legal holder hereof thereupon become immediately due and payable without notice, together with all just and reasonable expenses, costs and disbursements, including reasonable attorneys' fees, to the extent permitted by law, incurred for suit or collection. After maturity, each of said monthly installments shall bear interest at the highest legal rate.

This Note is secured by a Security Agreement.

Paverite, Inc. (Maker)

By /s/ MELVIN J. McCLELLAN, Pres.

By _____

RTS:pag:11/16/79

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

IN RE: PAVERITE, INC., DEBTOR;	Bankruptcy No. BK-3-78-646
PAVERITE, INC., Plaintiff,	)
v.	)
ITT INDUSTRIAL CREDIT COMPANY, Defendant.	) FILED NOV 23 1979

AGREED ORDER

Upon consideration of the pleadings filed in this action, and the agreement of the parties as indicated by signatures of counsel hereon, the Court having entered an

order on November 7, 1979, allowing ITT's claim of Twenty-six Thousand, Eight Hundred Thirty-three Dollars and Thirty-three Cents ($26,833.33) as an expense of administration, it is

ORDERED, that ITT Industrial Credit Company shall have, in addition to its claim for expenses of administration, an unsecured claim in the amount of One Hundred Fifty Thousand, Six Hundred Thirty-three Dollars and One Cent ($150,633.01).

Enter this 23 day of November, 1979.

/s/ CLIVE W. BARE
Clive W. Bare
Bankruptcy Judge

Approved for Entry:

/s/ JOHN A. WALKER, JR.
John A. Walker, Jr.,
Attorney for Paverite, Inc.

/s/ R. THOMAS STINNETT,
Attorney for ITT Industrial
Credit Company

IN THE
CIRCUIT COURT FOR KNOX COUNTY,
TENNESSEE, AT KNOXVILLE

PAVERITE, INC., MELVIN J. McCLELLAN, and wife, BETTY McCLELLAN, Plaintiffs,	)	
v.	)	NO. 1-314-80
ITT INDUSTRIAL CREDIT COMPANY, Defendant.	)	

ORDER

This cause came on to be heard on the 15th day of September, 1980, before the Honorable Chester R. Mahood, Circuit Judge, upon the Defendant's Motion for Summary Judgment, with the exhibits attached thereto, and Plaintiff's Affidavit, with the exhibits attached thereto. Having been fully advised thereon by the briefs and arguments of counsel, the Court is of the opinion that plaintiffs' cause of action is barred by the doctrine of res judicata and that Defendant's Motion should be sustained. Accordingly,

It is ORDERED, ADJUDGED AND DECREED that the Complaint of Paverite, Inc., Melvin J. McClellan, and wife, Betty McClellan, should be and is hereby dismissed with full prejudice.

It is further ORDERED that the costs of this cause are taxed to the Plaintiffs and their sureties.

State Court Order

ENTER this 17th day of September, 1980

/s/

Chester R. Mahood,
Circuit Judge

APPROVED FOR ENTRY:

/s/ J. EDWARD INGRAM
J. Edward Ingram,
Attorney for Plaintiffs

/s/ R. THOMAS STINNETT
R. Thomas Stinnett,
Attorney for Defendant

IN THE
COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

PAVERITE, INC., MELVIN J. McCLELLAN and wife, BETTY McCLELLAN	)	KNOX CIRCUIT
Plaintiffs-Appellants	)	HON. CHESTER R. MAHOOD, JUDGE
vs.	)	
ITT INDUSTRIAL CREDIT COMPANY	)	AFFIRMED
Defendant-Appellee	)	FILED MAR 31 1981

J. EDWARD INGRAM and J. DOUGLAS OVERBEY, WITH FOWLER & ROBERTSON, OF KNOXVILLE, TENNESSEE, FOR APPELLANTS

R. THOMAS STINNETT and STEVEN D. LIPSEY, WITH STONE & HINDS, OF KNOXVILLE, TENNESSEE, FOR APPELLEE

OPINION

Sanders, J.

The Plaintiffs have appealed from a summary judgment based on *res adjudicata*. The Plaintiffs-Appellants, Paverite, Inc., Melvin J. McClellan and wife, Betty McClellan, filed suit in the circuit court against the Defendant-Appellee, ITT Industrial Credit Company. The complaint alleges the Defendant filed a complaint in the chancery court in December, 1978, and wrongfully obtained a writ of possession for certain road-building equipment belonging to Plain-

tiff Paverite. The Plaintiffs, McClellans, were made parties defendant to the

[2]

complaint to recover any deficiency from them on their individual guarantee of the indebtedness of Paverite to ITT. Pursuant to the writ of possession the Defendant removed a number of pieces of equipment from Paverite's premises. As a result of the Defendant's action Paverite, in order to protect itself, had to file a Chapter XI petition in bankruptcy. As a result of the wrongful suing out of the writ of possession the Plaintiff, Paverite, lost substantial sums of money. They allege the McClellans were the principal stockholders in Paverite and as a result of the Defendant's wrongfully repossessing Paverite's equipment they lost substantial sums of money and a judgment in excess of $170,000 was rendered against them as sureties on Paverite's note owed on the equipment.

After filing its answer the Defendant filed a motion for summary judgment on the grounds of *res adjudicata*. The circuit judge sustained the motion and the Plaintiffs have appealed, saying the court was in error.

We cannot agree, and affirm the action of the trial court.

The same issue raised in this proceeding was adjudicated between the McClellans and the Defendant in the chancery court and between Paverite and the Defendant in the bankruptcy court. We shall first consider the chancery proceeding. After Plaintiff Paverite filed its petition in bankruptcy the suit which the Defendant had filed against the Plaintiffs in December, 1978, and which is the basis of their complaint, was dismissed as to Paverite since jurisdiction as to it was in the bankruptcy court. The chancery court, however, retained jurisdiction as to McClellans. Before the case went to trial in the chancery

court a stipulation was entered into between the McClellans and ITT. It provides, in part:

[3]

"At the trial of this cause, Melvin J. McClellan and Betty McClellan will rely exclusively upon the following affirmative defenses, which are denied by ITT, in order to defeat entirely or off-set a portion of the claim of ITT against them:

"(a) That the writ of possession obtained by ITT on December 21, 1978, was wrongfully obtained, was obtained by use of a false affidavit, and resulted in substantial injury to Paverite, which damages are in excess of the amount sued for. Melvin J. McClellan and Betty McClellan guaranteed only the amount of the indebtedness of Paverite to ITT and Paverite not being indebted to ITT, Melvin J. McClellan and Betty McClellan have no liability to ITT."

Upon the trial of the case the chancellor found the issues in favor of ITT and against the McClellans and entered a judgment in excess of $170,000. In his memorandum opinion filed in the case the chancellor said:

"They [McClellans] raise two defenses. First, they contend that when the Writ of Possession was obtained by Plaintiff, ITT, on December 21, 1978, the allegations in the Complaint, that Plaintiff's security was being impaired, was not correct and, thus, the attachment was wrongfully obtained; that because of the wrongful suing out of the Writ, Paverite has suffered serious damages, and that the McClellans are entitled to the benefit thereof."

* * *

"Next, we return to the question of the claim of

the wrongful obtaining of the Writ of Possession. Defendants contend that the facts do not support ITT's claim, that ITT's security was being impaired."

* * *

"Considering all of the evidence before us, it's difficult to see how this Court or any Court could have
[4]
denied Plaintiff its right to seize the property. That being the case, we don't think that the guarantors may benefit from the fact, that the Affidavit did not correctly state the facts that brought about the Attachment, and Judgment will be entered against them in the amount stipulated."

This, without question, adjudicated the same issues between the same parties as the case at bar.

The Plaintiff, Paverite, filed a Chapter XI proceeding in Bankruptcy on December 13, 1978. On January 8, 1979, ITT filed a claim in the bankruptcy court for $437,500.48 as a secured claim under a security agreement. On April 23 Paverite filed a complaint in the bankruptcy court against ITT. In that complaint it asked for a judgment against ITT for the same wrongs complained of in the complaint in this case. It also asked that ITT be required to return certain equipment to it. Based upon an agreement between Paverite and ITT the bankruptcy judge entered an order on July 23 permitting Paverite to retain certain equipment and directing that other equipment be surrendered to ITT as preferred security. That order also provides "that the complaint of Paverite, Inc., against ITT Industrial Credit Company be and is hereby dismissed without prejudice." Following this order ITT sold the equipment and on October 9 filed an

amended claim. The amendment changed the claim from a secured claim to an unsecured claim and reduced the amount to $181,375.13. On the same day Paverite filed an objection to ITT's claim. The objection states, in part, as follows:

> "The debtor hereby objects to claim number 4 filed in this case on January 8, 1979, by ITT Industrial Credit Company in the amount of $481,250.48, and in support of the Objection would show to the Court the following:"

[5]

It then relates, in substance, the same wrongful acts by ITT as set forth in the complaint in the case at bar, alleging it resulted in damage to Paverite, and concludes as follows:

> "Wherefore, the debtor prays the judgment of the Court on its objection to the claim of ITT Industrial Credit Company."

On November 23 the bankruptcy judge entered the following agreed order:

> "Upon consideration of the pleadings filed in this action, and the agreement of the parties as indicated by signatures of counsel hereon, the Court having entered an order on November 7, 1979, allowing ITT's claim of Twenty-six Thousand, Eight Hundred Thirty-three Dollars and Thirty-three Cents ($26,833.33) as an expense of administration, it is
>
> "ORDERED, that ITT Industrial Credit Company shall have, in addition to its claim for expenses of administration, an unsecured claim in the amount of One Hundred Fifty Thousand, Six Hundred Thirty-three Dollars and One Cent ($150,633.01)."

The order bears the signatures of counsel for both Paverite and ITT.

We think this order is the final adjudication by the bankruptcy judge of all claims of ITT and the objections thereto by Paverite.

Paverite argues that the order did not adjudicate the issues raised in its objections to ITT's claim. It says its objections were to the original claim of ITT, that it did not file objections to ITT's amended claim. It says that, since the order entered on July 23 was "without prejudice," it can maintain this suit. It further points out that, although ITT's amended claim and its objection to the original claim were both filed on October 29, the time clock stamps on the documents show the objections were filed at 8:30 and the amended claim was filed at 8:45.

[6]

We think Paverite's argument is without merit. We will consider first its insistence that its objections were filed to the original claim and not the amended claim. The fact that ITT amended its claim doesn't put it in the posture of having two separate and distinct claims. It had only one claim. In the beginning it was a secured claim in excess of $400,000. After the court, by its order of July 23, surrendered the collateral to ITT, its claim was reduced to less than $200,000 and at that point was unsecured, but at all times was one continuing claim. Also, it is to be noted that the objections filed by Paverite did not run to the amount of the claim or its security. Nor were any objections filed until after the security had been surrendered to ITT and the amount of its claim substantially reduced. As for the order of July 23 which dismissed Paverite's claim against ITT without prejudice, that order related to the original suit

filed by Paverite on April 23. The order was entered some three months before the objections were filed. The only relation there is between that order and the objections filed to the claim is that the "without prejudice" provision permitted Paverite to assert the alleged wrongful acts of ITT for a second time as a defense to its claim. It will also be observed that the order of November 23 says "upon consideration of the pleadings filed in this action," etc. What pleadings were there for consideration other than the claim of ITT and the objections of Paverite? Also, can it be said that the court was at liberty to ignore the objections of Paverite to the claim of ITT because ITT amended its claim to an unsecured claim for a lesser amount and the objections had no relation to the amount or the security? We think both questions answer themselves.

[7]

It is the rule in this state that issues adjudicated in the bankruptcy court are recognized as *res adjudicata* in our courts. See *Meacham v. Haley*, 38 Tenn.App. 20, 270 S.W.2d 503 (1954).

The case of *Pile v. Pile*, 134 Tenn. 370, states quite clearly the elements necessary for the doctrine of *res adjudicata* to be applicable. It says:

> "In order that a judgment may be effective as *res adjudicata*, it is essential that the party sought to be precluded thereby should have sued or been sued in both cases, in the same capacity or character and to enforce or have adjudged the same right, and it must appear not only that the *res* affected by the two suits is the same, but that the proceedings were for the same object or purpose, the same point being directly in issue.

Bank v. Smith, 110 Tenn., 338, 75 S.W., 1065; *Melton v. Pace*, 103 Tenn., 484, 53 S.W., 939."

We think all of these criteria are met by the adjudication of the matters in the chancery court as to the McClellans and in the bankruptcy court as to Paverite.

Counsel for the Appellee, in his brief, cites us to the case of *United States v. Coast Wineries, Inc.*, 131 F.2d 643. We think this case is applicable to the issues in the case at bar. There the court said, at 648:

"Subject to the right to obtain a reexamination on review, an order disallowing a claim in bankruptcy is binding and conclusive on all parties or their privies, and being in the nature of a final judgment, furnishes a basis for a plea of *res judicata*. 8 C.J.S., Bankruptcy, p. 1314, § 444; In re Anderson, 2 Cir., 279 F. 525; United States v. American Surety Co., 2 Cir., 56 F.2d 734; In re Universal Rubber Products Co., D.C., 25 F.2d 168. The judgments, decrees, and orders of the bankruptcy court in bankruptcy matters possess all the attributes of finality and estoppel accorded to judgments from courts of general original jurisdiction. Remington on Bankruptcy, 4th ed., Vol. 5, § 2312-75, p. 459."

[8]

The issues are found in favor of the Appellee. The judgment of the trial court is affirmed and the cost of this appeal is taxed to the Appellants. The case is remanded to the trial court for the collection of costs.

/s/ CLIFFORD E. SANDERS
Clifford E. Sanders, J.

CONCUR:

/s/ HOUSTON M. GODDARD,
Houston M. Goddard, J.

/s/ HERSCHEL P. FRANKS,
Herschel P. Franks, J.

IN THE
SUPREME COURT OF TENNESSEE
AT KNOXVILLE

PAVERITE, INC., MELVIN J. McCLELLAN AND BETTY McCLELLAN, Plaintiffs-Appellants,	FILED JUN 29 1981
vs.	Knox Equity
ITT INDUSTRIAL CREDIT COMPANY, Defendant-Appellee.	

ORDER

Upon consideration of the application for permission to appeal and reply thereto, briefs of counsel and the entire record in this cause, the Court is of the opinion that the application should be and the same hereby is denied at the cost of appellants.

PER CURIAM

Tennessee Supreme Court Order

IN THE
SUPREME COURT OF TENNESSEE
AT KNOXVILLE

PAVERITE, INC., MELVIN J. McCLELLAN and BETTY McCLELLAN, Plaintiffs-Appellants,	)	FILED AUG 3 1981
vs.	)	Knox Law
ITT INDUSTRIAL CREDIT COMPANY, Defendant-Appellee.	)	

ORDER

The petition for rehearing filed in this cause is denied at the cost of the appellants.

PER CURIAM

Opposition

Office - Supreme Court, U.S.
FILED
NOV 27 1981
ALEXANDER L. STEVAS
CLERK

NO. 81-803

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PAVERITE, INC.,
Petitioner,

v.

ITT INDUSTRIAL CREDIT COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Tennessee

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

R. THOMAS STINNETT
Post Office Box 2526
Knoxville, Tennessee 37901
(615) 546-6321
Attorney for Respondent

STONE & HINDS, P.C.
Of Counsel

TENNESSEE LAW PRINTERS, P. O. Box 377, Knoxville, Tennessee, Phone 525-4902

11-20-81-46

QUESTION PRESENTED FOR REVIEW (RESTATED)

Did the Courts of Tennessee properly apply an Order of the Bankruptcy Court in dismissing on the ground of res judicata a Complaint brought by a corporation reorganized under Chapter XI of the Federal Bankruptcy Act of 1898, as Amended?

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TABLE OF AUTHORITIES

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United States v. Verrier, 179 F.Supp. 336 (N.D. Me. 1959) 3

RULES OF COURT:

Sup. Ct. R. 17 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. 81-803

PAVERITE, INC.,
Petitioner,

v.

ITT INDUSTRIAL CREDIT COMPANY,
Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

As in the Courts below, the Petitioner shall herein be referred to as Paverite, and the Respondent shall be referred to as ITT.[1] References indicated by an "A" followed by a numerical listing are to the Appendix to Paverite's Petition for Writ of Certiorari.

[1] ITT Industrial Credit Company is a wholly owned subsidiary of ITT Financial Corporation, which is a wholly owned subsidiary of International Telephone & Telegraph Corporation, a publicly owned corporation.

STATEMENT OF THE CASE

On December 22, 1978, Paverite filed a voluntary petition under Chapter XI of the Federal Bankruptcy Act of 1898, as amended. On January 8, 1979, ITT Industrial Credit Company filed a Proof of Claim (A-18) as a secured creditor of Paverite. By written amendment (A-31) filed in the Bankruptcy Court on October 19, 1979, at 8:45 a.m., the claim was reduced to a priority claim of Twenty-six Thousand, Eight Hundred Thirty-three Dollars and Thirty-three Cents ($26,833.33) and an unsecured claim of One Hundred Fifty-four Thousand, Five Hundred Forty-one Dollars and Eighty Cents ($154,541.80). The reduced amount reflected proceeds from sale of collateral and economic depreciation received during the pendency of the proceedings.

On October 19, 1979, at 8:30 a.m., Paverite filed written objections (A-29) to the claim of ITT. The objections were that the claim was based on a usurious obligation and that ITT had wrongfully obtained a writ of possession which proximately caused Paverite to incur damages in excess of the claim.

An order was entered on November 7, 1979, allowing ITT's priority claim in full as an expense of administration. Thereafter, on November 23, 1979, an Agreed Order (A-35) was approved and entered by the Bankruptcy Court allowing ITT an unsecured claim for the additional sum of One Hundred Fifty Thousand, Six Hundred Thirty-three Dollars and One Cent ($150,633.01).

The Complaint initiating this case in the Circuit Court for Knox County, Tennessee, again charged ITT with wrongfully obtaining a writ of possession which proximately caused Paverite to incur substantial damages. The Complaint was dismissed (A-37) by summary judg-

ment on the basis of *res judicata*. The Tennessee Court of Appeals affirmed (A-39), and the Tennessee Supreme Court denied Paverite's application for permission to appeal (A-47).

SUMMARY OF ARGUMENT

I. In its objections to the claim of ITT, Paverite did in fact place at issue the alleged wrongful repossession. Thus, it is immaterial that Paverite was not required to do so. Accordingly, no federal question is presented.

II. It is consistently held that the orders of a Bankruptcy Court possess all of the attributes of finality and estoppel accorded from courts of general original jurisdiction.

ARGUMENT

Disposition of ITT's plea of *res judicata* in the state courts did not require an interpretation of the Bankruptcy Rules[2] then in effect. Moreover, the treatment accorded the orders of the Bankruptcy Court by the Tennessee Court of Appeals is consistent with Federal treatment. *Lessee v. Gray*, 236 U.S. 70 (1915); *United States v. American Surety Company of New York*, 56 F.2d 734 (2d Cir. 1932); *United States v. Coast Wineries, Inc.*, 131 F.2d 643 (9th Cir. 1942); *United States v. Verrier*, 179 F.Supp. 336 (N.D. Me. 1959).

The Tennessee Court of Appeals did not deal with the "critical" distinction between adversary cases and con-

---

[2] Paverite has cited the Court to Rule 713 and Rule 914, United States Code, Title 11, and asserts these Rules were not properly applied by the Tennessee Court of Appeals.

tested matters because the distinction is neither critical nor necessary in this case. ITT has never asserted the doctrine of *res judicata* applies because Paverite failed to raise a compulsory counterclaim in Bankruptcy Court. In point of fact, ITT agrees with the statement that:

> Because the claim filed by ITT in the bankruptcy court initiated a contested matter, Paverite was not required to raise the issue of wrongful repossession in defense of that issue.[3]

The gravamen of this lawsuit is readily apparent in the two sentences immediately following the above-quoted material, to-wit:

> That it was raised does not in and of itself prove that it was adjudicated by the bankruptcy court. In fact, it clearly was not adjudicated.[4]

Paverite's admission that the issue of wrongful repossession, the same issue upon which its present claim is based, was raised as a defense to the bankruptcy claim of ITT, clearly demonstrates that it was unnecessary for the state courts to make an express determination the defense was not a compulsory counterclaim. Thus, no Federal question was involved.

Paverite's assertion that its present claim was not adjudicated in the Bankruptcy Court is not supported by the record. Of course, the same assertion was made in the state courts. The Tennessee Court of Appeals responded succinctly and decisively, as follows:

---

[3] Petition for Writ of Certiorari, p. 13.

[4] Petition for Writ of Certiorari, p. 13.

> We think Paverite's argument is without merit. We will consider first its insistence that its objections were filed to the original claim and not the amended claim. The fact that ITT amended its claim doesn't put it in the posture of having two separate and distinct claims. It had only one claim . . . . It will also be observed that the order of November 23 says 'upon consideration of the pleadings filed in this action,' etc. What pleadings were there for consideration other than the claim of ITT and the objections of Paverite? Also, can it be said that the court was at liberty to ignore the objections of Paverite to the claim of ITT because ITT amended its claim to an unsecured claim for a lesser amount and the objections had no relation to the amount or the security? We think both questions answer themselves.[5]

The case of *United States v. Coast Wineries, Inc.*, 131 F.2d 643 (9th Cir. 1942), presents an issue similar to the one *sub judice*. The results have been the same. The Coast Wineries, Inc., was a firm in the business of distilling spirits and filed a petition for corporate reorganization in a bankruptcy proceeding. The United States filed three claims for taxes against it. The trustees filed an objection to all three claims.

One of the claims was for taxes on wine which had not been sold. That wine was later sold, and the trustee purchased and affixed to the wine containers the necessary revenue stamps. The attorney for the trustee

---

[5] Appendix to the Petition for Writ of Certiorari, A-44—A-45.

agreed to withdraw the objections to the other two claims when the attorney for the government agreed to withdraw this particular claim. The special master approved these transactions as did the District Judge.

Approximately three and one-half years later the government filed a new claim in District Court against the surety on the bond responsible for the taxes owed by Coast Wineries, Inc. The claim represented a portion of the taxes alleged to be due under the previously withdrawn claim.

The District Court held the proceeding *res judicata* between the United States and the surety. The government argued the original claim was withdrawn and never passed upon by the Court, but the Court of Appeals ruled that the compromise was an adjudication upon the merits.

In the instant proceedings, there was a claim which was subsequently amended, an objection to that claim and an Agreed Order approved by the Court. The total allowed claim was Three Thousand, Nine Hundred Eight Dollars and Seventy-nine Cents ($3,908.79) less than asserted by ITT. As in *Coast Wineries*, the compromise reached by Paverite and ITT, evidenced by an Agreed Order approved by the Court, was an adjudication upon the merits. Therefore, this prior adjudication should be afforded *res judicata* effect just as would any other judgment from a competent court.

CONCLUSION

The Petition for Writ of Certiorari does not present a substantial federal question. Further, the Tennessee Court of Appeals has applied the orders of the Bankruptcy Court in a manner consistent with other courts, including

this Court. Paverite's Complaint was correctly dismissed by the state courts under the doctrine of *res judicata*. Accordingly, the Petition for Writ of Certiorari should be denied. Sup. Ct. Rule 17.

Respectfully submitted,

R. THOMAS STINNETT
Post Office Box 2526
Knoxville, Tennessee 37901

Attorney for Respondent

STONE & HINDS, P.C.
Of Counsel

November 23, 1981.